United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6076

TO BE ARGUED BY
PATRICK J. MURPHY

IN THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT OF NEW YORK

----------x

BAY RIDGE ACTION COMMITTEE, INC., et al,,

Plaintiffs-Appellants,

v.

THOMAS EKELAND, et al.,

Defendants-Appellees.

----------x

CIVIL APPEAL

DOCKET NO. 75-6076

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On Appeal from an Order of the
United States District Court.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Issues Presented

The issue presented to the Court for review here is whether under traditional principles of equity and as a matter of law the District Court was clearly

erroneous in denying the plaintffs' motion for a preliminary injunction sought on grounds that the Federal agency violated the provisions of the National Environmental Policy Act ("NEPA") and the Federal Clean Air Act where the facts show:

1. The Federal agency's decision not to prepare an Environmental Impact Statement based on a Finding of Inapplicability in respect of a controversial major federal action was issued without notice affording opportunity to the public to comment and submit relevant facts although:

(a) Hanley v. Kleindienst, 471 F.2d, 831, 836 (2d Cir. 1972) requires such notice under NEPA § 102(2) (B) to "affirmatively develop a reviewable environmental record";

(b) HUD Reg. § 5(3) requires a "more comprehensive environmental procedure" than usual in such cases.

2. The Special Environmental Clearance Worksheet ("SECW") filed by the Federal agency as its environmental record did not treat the proposed action in terms of its incremental adverse environmental effects and the absolute and cumulative harm resulting from the major Federal action involved, although the decision in Hanley v. Kleindienst, supra, requires that the data be tested by and compared to such objective standards.

3. The Federal agency's action and its SECW failed to consider alternatives such as multi-family low rise construction proposed by the plaintiffs or to consider alternative lower tenant densities, although NEPA § 102(2) (D) requires as much that such alternatives must be separately considered.

4. The Federal agency's threshold determinations in its SECW are based virtually entirely on information collated from secondary sources, although an independent review and evaluation of the environmental data is required by NEPA, § 102(2) (C) and the provisions of the agency's Regulations, Section 5.

5. The Federal agency's threshold determinations in the SECW do not determine whether air pollution standards of the Federal Environmental Protection Agency under the Clean Air Act are violated, although

(a) Under regulations applicable to the New York City [40 CFR § 52, 1672 (C) (1)] specified minimum ambient air conditions must be attained;

(b) The SECW noted that air pollution levels in areas around the project were unsatisfactory 37% of the year or 135 days in 1973.

6. The Federal agency's decision and its SECW do not treat various environmental considerations raised by plaintiffs' affidavits such as destruction of economic

values and the quality of life in the surrounding neighborhood, special safety and fire hazard conditions posed by proposed high rise construction, special security problems involving police protection and safety from criminal attack, special air, noise, light and other pollution, caused by proposed construction, particularly with respect to sanitation, sewage, traffic, parking and environmental degradation resulting from:

(1) Overcrowding 350 people per acre into an area of generally much lower density consisting of single family homes and low rise apartments averaging 20 persons per acre;

(2) Placing elderly people in high rise construction equipped with only a fire hose and standpipe system which they cannot be expected to operate manually;

(3) Not including a general sprinkler system or other effective heat and smoke detection systems or smoke and heat containment systems;

(4) Under circumstances where security personnel will not be provided and police protection for the area will not be sufficient to protect a tenant population particularly vulnerable to criminal attack;

(5) Permitting such population density to come into an area with special air pollution problems, noise and traffic pollution problems resulting from proximity

to the Belt Parkway and other vehicular and traffic problems resulting from existing congestion of the surrounding area, and

(6) Exposing such population to health hazards caused by overloading the sanitation and sewerage systems indicated to be already inadequate by reason of small size and obsolescense, although:

(a) Hanly vs. Mitchell, 460 F. 2d 640, 648, (2nd Cir. 1972) determined that it was a violation under the Administrative Procedure Act, 5 USC Sec. 702, 706 et seq. under the "arbitrary and capricious" standard of review for an agency to make a determination under the National Environmental Policy Act without taking "into account all relevant factors", and

(b) Hanly vs. Kliendienst, supra, determined that such arbitrary and capricious action by a federal agency violates NEPA, Sec. 102 in that such action could not justify threshold determinations and a Finding of Inapplicability as the basis for failing to prepare an EIS.

JURISDICTION

The appeal taken herein is based on 28 U.S.C. Sec. 1292(a)(1). The appeal is from an order of the United States District Court for the Eastern District of New York entered July 25, 1975 after a hearing held before John F. Dooling, U.S.D.J. denying a motion for a preliminary injunction brought pursuant to Rules 7(b) and 65 of the Federal Rules of Civil Procedure.

Statement of the Case

The plaintiff, Bay Ridge Action Committee, Inc., is a Not-For-Profit Corporation organized under the laws of the State of New York. The plaintiff has, as one of its stated organizational purposes, the goal of improving the quality of life in the Bay Ridge community which it serves. Its co-plaintiffs are natural persons and homeowners, long time residents of the community whose lives and properties are directly affected by the major federal action which is the subject of the dispute herein.

The plaintiffs commenced this action for declaratory and injunctive relief to prevent the completion of the construction of an apartment complex funded entirely by the New York State Division of Housing and Community Renewal except to the extent of the federal government's participation under the housing laws of the United States administered by the United States Department of Housing and Urban Development (HUD).

The plaintiff's complaint alleges that HUD Defendants, Hills and Green violated the National Environmental Policy Act by failing to draft an EIS. The dispute centers around HUD's issuance of a Finding of Inapplicability based on a finding that the project has no significant environmental impact since otherwise there is no dispute that the project

involves a major federal action or whether an adequate EIS was drafted or prepared.

The plaintiffs have complained that prior to issuance of its Finding of Inapplicability HUD gave no notice to parties known to be interested in the project and did not afford the public an opportunity to be heard or to make submissions of relevant environmental facts bearing on the significance of the environmental impact of the project. It was further contended that the review done by HUD's environmental officers did not constitute an adequate environmental record nor an adequate review of the environmentally significant factors and that a threshold determination justifying a failure to draft, prepare and issue an EIS would have to be regarded as arbitrary or capricious.

In addition, the plaintiffs have pointed out that the inadequacy of the environmental record made by the defendant and its review of the environmentally significant factors include the failure to consider, study, develop and describe appropriate alternatives to the proposed major federal action put forth by the plaintiffs, such as multi-family low rise garden apartment complexes and other more economic lower density structures which would resolve the conflict over the use of the available resources.

STATEMENT OF FACTS

Without accepting the characterization of the facts found by the District Court the plaintiffs here feel that the history of the controversy is fairly well outlined by the District Court in Part 1 of its Memorandum and Order from page 3 through page 14.

Accordingly, it will not be necessary to restate this history not only to avoid repetition but equally because such history largely concerns itself with the history of proposals which were rejected by the community and the local and municipal bodies which acted upon these proposals before the Federal agency became involved.

It would be appropriate, however, with respect to the history of the controversy outlined by the District Court's Memorandum concerning the period preceding the entry into the controversy of the HUD defendant, Hills & Green, to add some pertinent facts:

(1) The District Court's Memorandum indicates at page 4 that the choice as faced by the local community groups and the local and municipal bodies has been the abandonment of the project or the modification of its design and magnitude. To the extent that this reference refers to the changes effected in the size of the project as a high rise project by the controversy that erupted in the

community, the observation by the District Court does not go far enough. Thus, from the beginning, from April 1972 onward, the opposition of the community to high rise construction has been one of the central issues of the controversy. Accordingly, the community propounded other choices and alternatives, namely, low rise garden apatments of the type then being constructed in the North Side section of Greenpoint in Brooklyn.

(2) The changes in the high rise construction proposed, effected before application was made to the HUD defendants Hills & Green, therefore are not viewed as alternatives so much as modifications of one alternative.

(3) The present project thus is the only project ever actually submitted for the approval to HUD defendants, Hills and Green.

(4) The present construction and no other alternative was examined in the Special Environmental Clearance Worksheet issued by defendant Green's office. The only contact HUD had with the proposed project prior to the emergence of this proposed construction and the application defendant Goodwin for HUD interest subsidies under date of March 11, 1974 was an application for reservation of contract authority filed in December 1972.

(5) In connection with the project selection crieteria contained in the application for reservation of contract authority plaintiffs in their complaint have indicated that substantial false and fraudulent misrepresentation of material fact or omission of material fact were made by the Shore Hill defendants as to: (a) the proposed project's housing rating; (b) the proposed project's minority employment rating; (c) the proposed project's environmental rating; and (d) the applicant's demonstrated rated competence and ability to perform, carry out and complete the Project.

With respect to the history of the controversy from the point of the application of defendant Goodwin for the HUD interest subsidies, again, the District Court's Finding of Facts from page 14 to 28 does not bear repeating again out of a regard for avoidance of duplication. However, the characterization of these facts need not be accepted. In this connection it is worthwhile to point out the following:

(1) The Court (page 17 of its Memorandum) repeats the unproved and self-evidently incorrect assertion contained in the Shore Hills defendant's application, to wit, "The Project is not in the traffic pattern of an airport, highway or open subway .... Therefore poses no vibration problems." It is clear, however, that the marginal park separating

the Belt Parkway from Shore Road which fronts the proposed Project is no more than a distance of 150 feet. The traffic of the Belt Parkway as far as noise is concerned is thus very much a traffic pattern affecting the area as well as is the takeoff, and particularly, the landing, patterns of aircraft using JFK International Airport and Newark International Airport, both of which airports are within 20 miles of the site. It is of course self-evident that, given the speed at which jet aircraft approach, a landing only 20 miles away will require aircraft to be at low altitudes in all weather and in cases of bad visibility with low ceilings, such aircraft naturally will be very much lower, causing exceptionally noticeable noise levels.

(2) The information contained on Form ECO-1 prepared by the applicant Shore Hill defendants, was used by Mr. Batstone, who prepared the Special Environmental Clearance Worksheet, Form ECO-3, For HUD. At the hearings held July 10 and 11 by the District Court with respect to plaintiff's motion for preliminary injunction, Mr. James D. Fleming Environmental Clearance Officer for HUD was subpoenaed by the plaintiffs and testified as to the preparation and contents of the Special Environmental Clearance Worksheet. Mr. Fleming's testimony (set forth in the Transcript, hereinafter TR) elicited the following:

(1) That controversies over housing projects raising environmental issues can warrant the writing of a full Environmental Impact Statement. TR, p. 71.

(2) That the famous or notorious Forest Hills housing project was one such project that was deemed to warrant the writing of a full Impact Statement. TR, p. 72.

(3) That by Mr. Fleming's recollection the environmental issues involved in Forest Hills dealt with, among other things, noise and undue impact on infra structures such as sewers and utilities. TR, p. 72.

(4) Mr. Fleming noted that noise level impact criteria was associated with the proximity of the Forest Hills project to the Long Island Expressway and LaGuardia Airport. TR, p. 73.

(5) With respect to the Bay Ridge area and the proposed construction in this case, Mr. Fleming indicated the threshold decisions regarding impacts on infra-structures of the SECW were based on a narrative contained in a section of the report dealing with sewerage and sanitation. TR, p. 76.

(6) With respect to the unfavorable ambient air conditions in the area noted by the SECW, Mr. Fleming acknowledged that Mr. Batstone did not consult the Environmental Protection Agency and that no testing of the

ambient air quality conditions or other measurement of the incremental absolute, cumulative or other comparative effect was emloyed within the SECW by Mr. Batstone. TR, p. 84, 85, 86.

(7) With respect to the personal security problems of the elderly population to be housed in this project Mr. Fleming acknowledged that no independent assessment or review of the security aspects of the project was undertaken as to these particuarly vulnerable people as part of the SECW. Tr, p. 86-89.

(8) Further, in connection with the ambient air quality of the area, Mr. Fleming's testimony showed that no attention at all was given to the carbon monoxide emission levels of the area or any assessment as to whether the proposed construction would have any effect on whether the Federal Clean Air Act Standards would be complied with or whether the Environmental Protection Agency's requirements for New York City would be satisfied or violated in any way by the proposed construction. TR, pp. 99-100.

(9) With respect to special fire hazards and fire safety conditions, Mr. Fleming acknowledged that no fire study was done by the Fire Department and that the SECW contained no report as to the evacuation capability of the proposed construction in the event of a fire or smoke condition. TR, p.108.

(10) Further, in connection with the Environmental Protection Agency standards for minimum carbon monoxide emission levels which may be permitted in New York City by the deadline of January 1, 1977, which is the approximate projected completion date for the Shore Hill Apartments, Mr. Fleming admitted that no study had been done as to the noise levels or carbon monoxide levels or emission levels resulting from the proximity of the project to the Belt Parkway. TR. p. 110.

(11) With respect to alternatives such as the multi-family low rise garden apartment complexes proposed by the plaintiffs, Mr. Fleming's testimony showed that no such alternatives were considered. TR, p. 121.

(12) In summary, Mr. Fleming testified that the SECW contained in sum and substance all that was done by HUD and nothing of materiality is left out. Tr, p. 105.

Mr. Richard Polizzi testified on behalf of the plaintiffs at the hearing held July 10, 1975. Mr. Polizzi qualified as an expert with 25 years' experience in the installation, maintenance, inspection and operation of all types of fire safety and fire prevention equipment. TR, p. 170-171, 180-199.

Mr. Richard Pollizi testified that after reviewing the proposed fire safety equipment and standards for the project he recommended to the Shore Hill defendants that a sprinkler system be installed throughout the building. TR, p. 178.

In response to the fire safety hazards the SECW essentially concludes that the fire hazard objection has been met because "the Fire Department does not anticipate any unusual difficulties in protecting the structures." District Court Findings of Fact, p. 24.

Whether it will take a fire involving more than unusual difficulty to burn out all the floors of the buildings above the 7th or 8th floor and kill, either through smoke or fire, all of the people found there is something the SECW did not trouble to inquire as to, nor apparently did the District Court allude to it. This is interesting in view of the fact that the Court did also not choose to treat with Mr. Polizzi's testimony to the effect that above the 7th and 8th floor a fire or smoke condition could take command of the buildings inasmuch as the Fire Department's equiment does not reach above the 7th or 8th floor and the standpipe system to be installed in the project would be worthless to an elderly population unable to operate it for protection. TR, p.180.

On July 25, 1975 the District Court issued its Findings of Fact and Order denying plaintiff's motion for a preliminary injunction, whereupon the plaintffs have brought this appeal for injunctive relief.

In addition to demonstrating the illegality of the federal decision in issuing a finding of inapplicability

and a finding of no significant environmental impact from this major federal action plaintiffs have shown that such illegality amounts to arbitrary and capricious action on the part of the federal agency and on the basis of the facts shown, the District Court was clearly erroneous in failing to grant the injunctive relief requested.

The plaintiffs have contended that they have met the traditional four-fold tests for determining whether preliminary injunctive relief should be granted. Accordingly the plaintiffs showed:

(1) That there was a probability that they would succeed on the merits of the causes of action contained in their complaint. Moreover, although the District Court Order at p.40 concludes that in the District Court's opinion it is extremely unlikely that the plaintiffs will prevail it does not rule out all probability of plaintiffs' success.

(2) Plaintiffs have shown that the damage to the environment and to their personal lives and property will be irreparable and that the balance of hardships lies with the plaintiffs since the costs involved to the defendants amount to the investment of State Housing Finance Agency funds which in relative terms are insignificant to the State, whereas the very lives and fortunes of the plaintiffs are involved and that finally a great matter of public interest is involved in granting the preliminary injunction

since the provisions of the National Environmental Policy Act are involved, which provisions self-evidently involve and evince a strong Congressional policy to protect the national environment.

As to the last three criteria the District Court's opinion made no comparative finding and thus we may conclude that with the existence of these four criteria and the illegality of the federal agency action shown above the District Court should have exercised a sound discretion in favor of granting the preliminary injunction.

POINT I

FAILURE TO GIVE PUBLIC NOTICE AND OPPORTUNITY TO EXAMINE THE SPECIAL ENVIRONMENTAL CLEARANCE WORKSHEET AND OFFER RELEVANT EVIDENCE PRECLUDED DEVELOPMENT OF ADEQUATE ENVIRONMENTAL RECORD

It is undisputed that the public was never informed of the defendant's decision to use the special environmental clearance procedure rather than to draft an environmental impact statement. It is further clear, that the contents of the special environmental clearance form also were not divulged to the public. It is again clear that in addition to the failure to notify the public, no opportunity was given to the public to offer relevant environmental evidence for the purpose of informing defendants Hills and Green ~~in this Court~~ in the decision making process.

Hanley v. Kleindiest, supra. stated at p. 836:

> "Before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision."

A public hearing would have produced the quantitative and qualiftative data required under NEPA by this Court in Hanley v. Kleindiest, supra.

A public hearing would have elicited the quantitative adverse environmental effects and the extenc such impacts would exceed those of present existing uses in the area. This incremental input would be examined in terms of the absolute, relative and comparative impacts the project would bring to the community.

Thus, a public hearing could have disclosed:

1. Whether the combined sewers and drainage facilities of the area were presently adequate, could accommodate additional flows and to what extent. However, the SECW (attachment to paragraph H) indicates no measured comparison of these relevant environmental conditions were adduced. The SECW merely states that HUD was given assurance that the allowable flow standards would be met.

2. Whether the area was able to absorb any additional demand for offsite street parking; whether present parking conditions in the area are already were overtaxed and to what extent the project would cause new serious problems. The SECW in paragraph H does not at all treat the incremental cumulative or comparative impact on the parking problem.

3. Whether the relative ambient air quality in the area would be worsened. Although the applicants' ECO-1 (paragraph E,) indicated that the records of the New York City Air Quality Control Board reported in 1973 that the air in the area was unsatisfactory 37% of the time or

135 days of the year, the SECW made no attempt to gauge the absolute or relative impact of this condition on the health of the proposed tenants and to what extent the project would contribute to the problem.

4. What are the relative acceptable noise conditions for the area. These were not evaluated by the SECW in any but the most conclusory manner. The existence of the Belt Parkway, a major arterial highway within 150 feet of Shore Road at the point of the project site, was ignored.

5. What is the societal effect of pouring 350 people per acre into the site and its effect on a surrounding area of considerably lower density. The SECW rested with an observation that the zoing classification would permit the proposed density.

6. What about alternatives involving lower-cost, less-density, low rise apartments involving different economics through the use of alternative construction materials and designs. The SECW merely reviewed the history of the modification of the high-rise design which had occurred in the period before the Federal agency's role in the project for NEPA purposes had begun. In a full discussion of the fire hazard and crime safety problems of the area, the SECW should have, but did not reveal any analysis of these problems and no real

consultation with the Police and Fire Departments was disclosed in respect of the fire and crime problems, particularly in comparison with alternative low-rise, low-density construction.

It was to obtain just such critical inputs that the notice requirements laid down by Hanley v. Kleindienst, supra., should have been observed by HUD. HUD'S Regulation § 5(3) also recognizes that public controversy on environmental issues should weigh heavily toward shaping a threshold decision to undertake an EIS and in any event requires a more comprehensive environmental procedure than usual in such cases.

On the basis of the foregoing, it is clear that the agency in making a threshold determination as to environmental significance must make an effort toward assessment, analysis and evaluation that is proportionate to the effort that would otherwise be required in a detailed statement on environmental impacts. It is also clear from the foregoing that such a proportionate formulation must be made as to aesthetic and unquantifiable consideration as well as technical data and other quantifiable considerations.

By ignoring these requirements, HUD failed to produce an adequate record for review.

§ 102(2) (b) of NEPA however, requires the responsible agency to "identify and develop methods and procedures ... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations."

With reference to the quoted portion of the statute this Court in Hanley v. Kleindiest, supra, at p. 835, stated that:

> "Since an agency, in making a threshold determination as to the 'significance' of an action, is called upon to review in a general fashion some factors that would be studied in depth for preparation of an environmental impact statement, §102(2) (E) requires that some rudimentary procedures be designed to insure a fair and informed preliminary decision. Otherwise the agency, lacking essential information might frustrate the purpose of NEPA by a threshold determination that an impact statement is unnecessary."

By failing to give notice to the public, by failing to receive and evalute information the public might offer, by failing to search out data and to subject it to comparative analysis, HUD failed all its obligations under NEPA Section 102(2)(B). The District Court should not have countenanced these violations by denying the motion of preliminary injunction.

POINT II

THE SECW DID NOT ATTEMPT TO OBTAIN ABSOLUTE DATA THAT COULD BE USED IN DETERMINING THE INCREMENTAL AND CUMULATIVE HARM RESULTING FROM THE PROPOSED ACTION

The SECW was prepared by Frank Batstone a retired former employee. The SECW (attachment to paragraph F) indicated the efforts made by Mr. Batstone who signed the report.

Mr. Batstone's report did not include relevant information and reports from the Police Department, Fire Department, Sanitation Department, Highway Department, and U.S. Environmental Protection Agency.

Mr. Batstone's report was signed and approved by Mr. Fleming notwithstanding that he knew an environmental impact statement had been dicated in respect of the so-called Forest Hills Project, a project sharing with respect to Shore Hill the following characteristics:

(a) They are high-rise residential projects.

(b) They parallel major arterial highways; and

(c) They are in the traffic pattern of major airports.

No evaluation specifically dealing with the serious air pollution problem existing in the area and acknowledged in Mr. Batstone's report, was carried out using Federal EPA standards under the Clean Air Act.

Mr. Batstone's report did not treat with the serious fire safety problems resulting from a proposed high-rise project, and alternatively, did not discuss the comparative fire safety advantages of a low-rise garden apartment complex.

In addition, the testimony of Richard Pollizi, an expert in the design, installation, use and effectiveness of fire safety equipment associated with fire safety problems uncontrovertibly showed:

(a) The fire fighting apparatus of the Fire Department of the City of New York does not extend beyond the seventh floor of a building.

(b) Fire or smoke conditions could be expected to take control of a floor above the seventh floor in a high-rise building such as Shore Hill; Shore Hill is not designed to include sprinkler systems and heat, fire and smoke detection systems which are the most effective fire safety systems.

(c) Shore Hill would have a standpipe system which an elderly population would not likely be able to operate.

The Court in Hanley v. Kleindienst, supra. formulated the minimum objective standards which the agency must adhere to in determining whether a proposed major Federal action is significant for environmental purposes. The Court set forth the following test which the agency must use for purposes of this threshold determinations under NEPA § 102(2) (C): The agency must determine:

1. The extent to which the action would cause adverse environmental effects in excess of those created by existing uses in the area affected by it; and

2. The absolute quantative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the area. Hanly v. Kleindienst, at 831.

In the absence of objective standards that would permit the agency to determine where an action is "obviously insignificant" and hence, would not require an impact statement, this Court has noted that the existence of absolute as well as comparative effects of a major Federal action must be considered. Where such effects exist, having arguable or potentially significant effect on the human environment, it would clearly be impossible to dispense with an EIS in respect of a major Federal action. Hanly v. Kleindienst, at 831.

The SECW and the Finding of Inapplicability issued here, is however, totally innocent of any involvement of the type mandated by this court in Hanly v. Kleindienst.

This obliviousness was none the less blessed by the District Court's refusal to grant a preliminary injunction.

POINT III

INJUNCTION SHOULD BE GRANTED FOR FAILURE OF DEFENDANTS HILLS AND GREEN TO CONSIDER ALTERNATIVE CONSTRUCTION AS REQUIRED UNDER NEPA § 102(2)(D)

The plaintiffs have insisted throughout that a low-rise, low-density garden apartment complex would have provided a possible economical alternative with reduced adverse significant environmental impact. They cite the fact that such an alternative would involve lower cost construction materials, such as wood, in place of more expensive concrete and steel and would be free of some of the more expensive special construction facilities such as elevator systems involved in high-rise and also would not require the more expensive excavation and foundation work that a high-rise requires. In addition, plaintiffs insist that the cost of the land for the project under New York law should be lower than the artifically inflated cost used here, which in turn would improve greatly the economics of a proposal for such a garden apartment complex. Notwithstanding all this, no consideration at all was given to such an alternative.

Section 102(2)(D) of NEPA requires that the responsible officials of the agency:

> "Study, develop and prescribe the appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

As stated by the Court in Greene County at p.420, this Section is:

> "A mandate to consider environmental values 'at every distinctive and comprehensive state of the [agency's] process'. The primary and non-delegable response for fulfilling that function lies with the Commission."

Recently this Court in Trinity Episcopal School Corporation v. Karlen, Docket No. 75-7061, (decided July 24, 1975) stated:

> "Federal agencies must consider alternatives under §102(2)(D) of NEPA without regard to the filing of an EIS and this obligation is phrased to encompass a broad type of consideration - 'study, develop and describe'.", Trinity at p. 5079.

The consideration of alternatives to a proposed action is one of the key facets of NEPA and the regulations and decisions that have followed its enactment. For example, Section 102(2)(C) (iii) of NEPA requires that impact statements include a detailed description of "alternatives to the proposed action"; and this mandate is further underscored by the directives of Section 102(2)(D) that agencies "[s]tudy, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative

uses of available resources". These admonitions are repeated in the CEQ Guidelines [40 CFR §1500.8(a)(4)], which calls for a "rigorous and objective evaluation of the environmental impacts of all reasonable alternative actions".

As the Second Circuit put it in Monroe County Conservation Council v. Volpe, supra, the "requirement for a thorough study and a detailed description of alternatives is the linchpin of the entire statement" [472 F.2d at 697-98].

Moreover, the consideration given alternatives must be more than cursory. As the Court wrote in 1-291 Why? Association v. Burns, 372 F.Supp. 223, (D. Conn. 1974), quoting Monroe County:

> "Mere passing mention of possible alternatives to the proposed action ... in ... a conclusory and uninformative manner renders an EIS fatally defective" [372 F.Supp. at 249].

Finally, enough data must be presented on alternatives to enable those assigned the task of commenting on the EIS to evaluate the recommended choice. [See, e.g. Silva v. Lynn, 482 F.2d 1282, 1286-1287 (1st Cir. 1973); NRDC v. Morton, supra, 458 F.2d at 836 (D.C. Cir. 1972); Montgomery v. Ellis, 364 F.Supp. 517, 521-22 (N.D. Ala. 1973)].

The rationale for this emphasis on the study of alternatives is obvious. The function of NEPA is to promote informed decision-making and a proper respect for environmental values. Knowledge as to environmental impacts

and economic costs must extend beyond the proposed action to possible substitute actions, for a proper decision on one proposal cannot be made without information about other possible courses of action. The possibility of minimizing or eliminating environment detriments cannot, in short, become a reality unless there is meaningful consideration of the possible ways of going at it.

By these standards, the defendants' treatment of alternatives was inadequate. The defendants failed utterly to deal with the plaintiffs' suggested alternative calling for low density, low bulk, low rise garden apartment housing. The treatment given such alternative was not even superficial at best. Defendants considered only this project before them and then only summarily.

The District Court should not have countenanced these violations of law.

POINT IV

THE SECW EVINCES NO ATTEMPT TO INDEPENDENTLY OBTAIN OR ASSESS DATA FOR ENVIRONMENTAL SIGNIFICANCE AND EFFECTIVELY ABDICATES HUD'S RESPONSIBILITY UNDER NEPA.

It is submitted that the SECW report prepared by Mr. Batstone is nothing more than a collation of second hand reports to which have been added superficial and conclusory observations.

As such, the report amounts to an abdication on the part of defendants Hills and Green's responsibility and obligations under Section 102 of NEPA.

In Green County Planning Board v. Federal Power Commission, 455 F. 2d 412 (2d Cir. 1972) just such an abdication was found to exist where the Federal Power Commission, in lieu of carrying out its own investigation and responsibility to determine the environmental impact attendant upon the construction of a high voltage transmission line, had substituted a statement prepared by the Power Authority of the State of New York as to the impact of a proposed pump storage power project on the environment.

At page 420 the Court held:

> "The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of [The Power Authority of the State of New York] for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as the umpire. The danger of this procedure and one obvious shortcoming, is the potential if not likelihood that the applicant's statement will be based upon self-serving assumptions."

Failure of Mr. Batstone to engage and consult with agencies such as the Federal Environmental Protection Agency and to employ that agency's air and water pollution standards and to independently employ HUD'S own noise pollution standards constitutes a failure to make an independent assessment and evaluation which is required by the agency whether the agency is proceeding under a Normal Environmental Clearance procedure, a Special Environmental Clearance procedure or is engaged in an Environmental Impact Study. The obligation is the agency's to make an independent assessment whatever the actual procedure of that assessment involves.

Similarly, the failure to independently obtain or develop evidence directly from sources such as the Police and Fire Departments of the City of New York and their sister agencies, the Sanitation Department, the Highway and Traffic Department and the Environmental Protection Agency of the City of New York, all constitute failures equivalent to

the failure similarly to consult with the other federal agencies. Mr. Batstone's report does not meet either the threshold or more detailed statement obligations of the defendants. In this case it has been adequately shown that Mr. Batstone merely collated the comments of interested parties and did not even consult with the federal agencies whose jurisdiction and competence are an integral part of the enforcement obligations under NEPA.

The failure of defendants Hills and Green to insure that Mr. Batstone's report would adequately meet their responsibilities is totally unforgivable since it has been shown that instructions printed on the special environmental worksheet form (ECO-3) used by Mr. Batstone direct that the report be completed in a manner which will result in an independent assessment and evaluation of the subject proposed construction.

As noted by the Court in Greene County at page 421:

> "Section 102(2)(C) of NEPA ... explicitly requires the agency's own detailed statement to 'accompany the proposal through the existing agency process'".

At page 420 the Court in Greene County also noted:

> "Intervenors generally have limited resources, both in terms of money and technical expertise and thus, may not be able to provide an effective analysis on environmental factors. It was in part for this reason that Congress has compelled agencies to seek the aid of all available expertise and formulate their own position early in the review process."

It cannot be overemphasized that HUD regulations Section 5(c)(1) specifically dictates that the agency "shall conduct an independent assessment and evaluation on Form ECO-3. On the basis of this assessment an environmental finding shall be made ..."

In respect of such a mandate we submit it is impossible to accept the District Court's statement at page 37 of its Order to the effect that "verification of the ECO-1 data is required ..., but, ... the Shore Hill submission was essentially a self-verifying disclosure readily and easily reviewed from an office chair. The independence of assessment and evaluation necessarily lay not in duplicating field work but in exercising judgment on the data."

The District Court's Order which is suffused with the confidence that the environmental data affecting a project of the scope and density involved at Shore Hill can be reviewed adequately from a desk at the HUD office some thirteen miles away in Manhattan can only be accepted if one is willing to ignore the mandate of the statute and the attempt of this court in its decision in Hanly, for example, to insure that adherence would be paid to the dictates of NEPA. This Court's efforts to impart to others some understanding of what is required to meet the requirements of the law becomes hopeless if such a deskbound touchstone is to be used for decisions as to the mandates of the statute.

POINT V

THE DISTRICT COURT AND THE SECW IGNORED VIOLATIONS OF THE CLEAR AIR ACT

(a) Violations of Air Quality Standards

In accordance with the provisions of the Clear Air Act, the U.S. Environmental Protection Agency has established "National Primary Ambient Air Quality Standards" for several pollutants, including carbon monoxide [40 CFR §§ 50.1 et seq.], which define the maximum permissible concentrations of the pollutants that can be tolerated in the surrounding air without undue dangers to the public health. The standards for carbon monoxide (CO), which must be attained in New York City by January 1, 1977 [40 CFR, § 52.1672(C)(1)], are for two measuring periods; an 8-hour period over which CO concentration may not exceed 9 parts per million more than once per year and a 1-hour period over which CO concentration may not exceed 35 parts per million more than once per year [40 CFR § 50.8 (a) and (b)].

It is clear from the ECO-1 filed by the Shore Hill defendants that the Shore Hill Apartments will violate the substantive air quality standards promulgated under the Clear Air Act, and for this reason alone, its construction should be enjoined.

As mentioned, the Federal Environmental Protection Agency (EPA) has established primary standards for carbon monoxide emissions [40 CRF § 50.8] pursuant to § 109 of the Clean Air Act [42 USC § 1857c-4] in order to protect the health of the American people. New York State agreed to an implementation plan for assuring compliance with the EPA standards, and the EPA, in turn, pursuant to further regulations [40 CFR § 52.1670(c) (1) has set the "attainment date" or deadline for compliance with such CO standards in the air quality control regior of which New York City is a part. The deadline, January 1, 1977 approximates the projected completion date of Shore Hill Apartments. While 1977 is the current attainment date in respect of the primary standards, that does not mean that efforts toward compliance are to be postponed until then. Rather, as the EPA regulations state:

> "The specification of attainment dates for national standards does not relieve any state from the provisions of § 51.15 of this chapter which requires all sources and categories of sources to comply with applicable requirements of the [implementation] plan - (a) As expeditiously as possible where the requirement is part of a central strategy designed to attain a primary standard... "[40 CFR § 52.20]

Notwithstanding that Shore Road, the site of the construction overlooks the Shore Parkway (Belt Parkway, Interstate-278), and is situate only 8 blocks from the Verranzano Narrows Bridge, no consideration was given as

to whether 8-hour ambient air quality standards for CO will be met or exceeded during "adverse traffic and meteorlogical conditions".

It should also be noted that under the Clear Air laws, infrequent violations are not the test. To the contrary, in order to protect the public health, the EPA primary standards, as noted, require that excess concentrations--above .9 per million--occur no more than once a year.

As indicated above, defendants had before them information that the air in the area under existing uses is unsatisfactory 37% of the time. They had knowledge that heat inversions had occurred in 1973 and presumably may occur again. In the face of this, they failed to make the tests and carry out consultations with EPA, required under § 102 (2)(C) of NEPA, as spelled out in the last paragraph thereof.

The defendants Green and Hills never came to grips with or acknowledged this problem and, indeed, failed to test for results. The error in this regard of failing to disclose or, indeed, even recognize the seriousness of a potential problem, meant that effective evaluation under NEPA was made impossible. The relevant facts necessary to inform decisionmakers and to bring on the finely-tuned balancing called for "to the fullest extent possible in NEPA, §102(2)(C) and the decision in Calvert Cliffs Coordinating Committee, v. A.E.C., 449 F. 2d. 1109 (D.C. Cir. 1971), simply were not there.

In addition to making the finely tuned balancing impossible, the failure to point up the seriousness and frequency of the CO violations also defeated one of the further primary functions of an EIS--to inform the decisionmakers, Congress and the public about all the significant environmental pros and cons of a proposed action [NRDC v. Morton, 458 F.2d 827, 833(D.C. Cir. 1972); EDF v. Corps of Engineers, 325 Supp. 728, 759 (E.D. Ark. 1971); EDF v. TVA, 468 F.2d 1164, 1174-75 (6th Cir. 1972); Council on Environmental Quality (CEQ) Guidelines 40 CFR § 1500.2(b)(3), 1500.6(e), 1500.8(a)(1) and (b).

(b) Violations of Noise, Traffic and other Pollutant Standards

In connection with noise impacts, the defendants Hills and Green summarily concluded that noise levels were not applicable to new housing construction such as Shore Hill Apartments.

The SECW assigned no adverse effects on the new tenants or on the surrounding community on the apparent theory that as compared to present levels, the Shore Hill related noise will not make such difference.

As to the noise impact contributed by the project itself, it should be recalled this Court concluded in Hanly that agencies must consider two relevant factors:

> "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the areas affected by it, and

(2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area." [471 F.2d at 830-31].

The court went on to say as to the second factor:

"Although the existing environment of the area which is the site of a major federal action constitutes one criterion to be considered, it must be recognized that even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel. Hence, the absolute, as well as comparative, effects of a major federal action must be considered." [471 F.2d at 831].

The District Court's opinion in its decision at page 33 uncritically rests with the simple assertion made in the SECW that No. 2 fuel oil would be used by the Project. No inquiry is made as to what incremental, comparative and cumulative effect the amount of emissions into the area using this or any other fuel for that matter would result from and be contributed by this Project.

Nowhere appears any suggestions as to the impact on the health of the proposed occupants since the SECW did not concern itself with possible air pollution effects on the respiratory conditions on an elderly population that would occupy the Project. Mr. Batstone naturally could not have made any estimate of its environmental impact from his desk. It seems to us, however, that the District Court's opinion should not have accepted Mr. Batstone's lassitude in this matter of environmentally significant importance.

POINT VI

THE FAILURE OF THE SECW TO CONSIDER ALL THE RELEVANT ENVIRONMENTAL FACTORS RESULTED IN A DETERMINATION OF "NO ENVIRONMENTAL SIGNIFICANCE" THAT VIOLATES THE "ARBITRARY AND CAPRICIOUS" STANDARD OF REVIEW.

In Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971), a threshold determination that a high rise building would not significantly affect environment was set aside where no weight had been given to the fact that it would change the character of the neighborhood and concentrate population in the neighborhood.

In Hanly v. Mitchell, supra, a related predecessor case to Hanly v. Kleindienst, supra, involving the same proposed construction, this Court reviewed the adequacy of a special environmental clearance worksheet prepared by the area office of defendant Green in terms of the proper scope of judicial review of the agency action. The plaintiffs had been contending for a more liberal standard of review against the defendants' more restricted view. With the prcedural mandates of NEPA in mind, the Court in Hanly v. Mitchell at p. 648 stated:

> "Even under the more limited test, we would reverse as to the proposed jail because it is 'arbitrary or capricious' for an agency not to take into account all relevant factors in making its determination."

In making their determination, the defendants' filing of their SECW hardly can be said to meet the test of "taking into account all the relevant factors" ... "to

the fullest extent" as required by strong Congressional policy and law. The more so when as here the SECW with respect to the proposed "major Federal action" (1) fails to deal with problems of air, noise and sanitary pollution, (2) ignores proposed alternatives involving less adverse effects, and (3) fails to evaluate threatened and potential substantial adverse personal injury, environmental and otherwise, to the plaintiffs, the community and even the intended occupants from special fire, crime-safety and related effects.

The factual issues presented by the plaintiffs merited real consideration and evaluation by HUD. For example one of the environmental objections raised by the plaintiffs related to whether the project "substantially increased the risk of crime in the immediate area, a relevant factor as to which the [SECW] fails to make an outright finding despite the direction to do so" as laid down in Hanly v. Kleindienst, supra, p. 834.

When one considers the other relevant factors involving substantial risk of adverse environmental effect which the SECW did not consider, study, analyze or make outright finding with respect to, it is clear that the District Court should have found that the "arbitrary and capricious" standard pointed to by Hanly v. Mitchell, supra, at p. 648 had been breached, to wit:

> "It is 'arbitrary or capricious' for an agency not to take into account all relevant factors in making its determination."

POINT VII

UNDER TRADITIONAL PRINCIPLES OF EQUITY THE DISTRICT COURT SHOULD HAVE GRANTED INJUNCTIVE RELIEF

The well-settled criteria for determining whether to grant preliminary injunctive relief are: (1) the probability of plaintiff's success on the merits; (2) irreparability of harm to plaintiffs pendente lite; (3) the balance of hardships between the parties; and (4) where appropriate, as here, the public interest. Studebaker Corp. v. Gillin, 360 F.2d 692 (2d Cir. 1966); Hamilton Watch Co. v. Benrus Watch Co., (206 F.2d 738 (2d Cir. 1953). In light of these criteria, the facts of this case fully warrant the granting of a preliminary injunction.

Beginning with the likelihood of success, we have set forth the relevant facts and arguments in our affidavits, at the hearing and in this brief, and we submit that we have shown a clear right to relief.

As to irreparable damage and the balancing of hardhsip, the Bay Ridge community is already beset by severe fire, safety, sanitation, sewerage, traffic and other pollution problems, and both in construction and operation, the Shore Hill project would make matters worse. The density, size, scope, and nature of this high-rise construction will work a degrading change in the human environment should it be permitted to go to completion, in favor of the low density, low-rise garden apartment complex favored by the community.

Such a change would work an injury to the plaintiffs and other residents of Bay Ridge both severe and irreparable. On the other hand, no such injury will accrue to defendants by forestalling the construction pending final disposition of this case.

Finally, as to the public interest, any violation of NEPA is, we submit, contrary to the public interest. In this respect, one of the major purposes of NEPA, of course, is to avoid irretrievable commitments of resources impinging upon the environment before full and good faith consideration has been given to the impacts and available options; and for this reason, courts have been particularly vigilant in enforcing the law through injunctive relief where that consideration has not been given [e.g. EDF v. Corps of Engineers, 324 F. Supp. 878, 880 (D.D.C. 1971); Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Lathan v. Volpe, 455 F.2d 1111, 1116 (9th Cir. 1971). Indeed, as stated in Lathan, the balancing of equities is really not appropriate. Congress has declared its policy strongly and clearly in NEPA, and where the mandates have not been followed, the public interest in effecting those policies is, in and of itself, the basis for injunctive relief [455 F. 2d at 1117].

The same reasoning is equally applicable here.

The Courts have recognized that injunction is the vehicle through which the Congressional enactment of NEPA may be effectuated. Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033 (7th Cir. 1973).

Generally it is recognized that projects proceeding in violation of NEPA should be enjoined until the mandate of law has been met. Brooks v. Volpe, 350 F. Supp. 269, supplemented 350 F.Supp. 287 (D.C. Wash. 1972).

In light of policy considerations underlying NEPA and the fact that a housing project being financed by the federal government and constituting a major federal action is involved, courts have held that it could not be said that filing a special environmental clearance sheet for the project satisfied the requirement of NEPA mandating an environmental impact statement whenever a major federal action is involved. Since there appears a reasonable likelihood that plaintiffs will prevail on the merits, and that a grant of preliminary relief would not irreparably harm defendants and that denial of relief would irreparably harm plaintiffs, the defendants should be ordered to take no action to aid in construction of project pending further order of court. Silva v. Romney, 342 F.Supp. 783 (D.C. Mass. 1972).

Failure of the federal agency to file an environmental impact statement when one is required should result in an injunction againt all further activity on the project until agency has complied with this section. Town of Groton v. Laird, 353 F.Supp. 344 (D.C. Conn. 1972).

The plaintiffs are clearly entitled to protection by injunction from the irreparable harm resulting from:

(1) the adverse environmental effects in excess of those of existing uses; and

(2) the absolute, quantitative and cumulative harm added by the proposed action. [Hanly v. Kleindienst, 83].

No respect was accorded this pronouncement of the 2nd Circuit in Hanley v. Kleindienst by defendants Hills and Green. The injunction which ought to issue for this reason alone, moreover, is not offset in any way by any consideration of dealy, expense or other additoinal trouble occasionable to defendants as a result of their own failures. Sierra Club v. Mason, 351 F. Supp. 419 (D.C.D. Conn. 1972).

In Sierra Club, supra, serious economic loss to oil companies occasioned by delay in dredging to permit more economic navigation and loading in New Haven harbor was not sufficient excuse for withholding issuance of injunction.

In this connection the Court in Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972), at p. 422-423, supra, also noted that:

> "Delay is a concomitant of the implementation of the procedures prescribed by NEPA ... It is far more consistent for purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible."

Here the very life of the community is affected and at issue. In fact, the quality of life may be so affected that in the opinion of a prominent real estate operator included as an affidavit in support of the motion for the preliminary injunction, the proposed construction could cause a destruction of $10 million to $15 million in community real estate values.

CONCLUSION

THE DISTRICT COURT AS A MATTER OF LAW UNDER TRADITIONAL PRINCIPLES OF EQUITY WAS CLEARLY ERRONEOUS IN DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND ACCORDINGLY SUCH ORDER SHOULD BE REVERSED AND INJUNCTIVE RELIEF GRANTED TOGETHER WITH ANY OTHER APPROPRIATE RELIEF WHICH THE COURT MAY DETERMINE.

Respectfully submitted,

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